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No. 88-1220

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

VICTORIA E. ULLMANN,

Petitioner,

v.

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER and JOB TAYLOR III,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

Respondents Olwine, Connelly, Chase, O'Donnell & Weyher and Job Taylor III oppose the petition for a writ of certiorari in this case to review of the judgment of the United States Court of Appeals for the Sixth Circuit. There is no reason whatsoever for granting the petition. The facts of this case do not present the purported "issues" suggested by Petitioner; the petition fails to show that any of the considerations for granting certiorari set forth in Supreme Court Rule 17.1 are present; and the decision below clearly was correct and in accord with decisions of this Court and of other courts of appeals.

Petitioner attempts to make this case something it is not by taking the amazing tack of admittedly ignoring the findings of fact of both courts below completely and basing her statement of the case solely on statements "of petitioner's position" drawn from her affidavits and motion papers (*See* Petition, p. 3) – which were considered and found incredible both by the District Court and the Court of Appeals. Given Petitioner's resort to this desperate and bizarre tactic, this Court need not tarry in assessing the truthfulness or relevance of Petitioner's statement of the case.

Because of the lengthy and largely irrelevant presentation by Petitioner, Respondents will not respond to every one of the many misstatements in her description of the case. The opinions of the District Court and the Court of Appeals adequately state the underlying facts of this action and the Court is respectfully referred thereto. Respondents will quote briefly from those opinions to

show the fantasy of Petitioner's description of the action and of the "issues" she suggests would be presented for review if the petition were granted.

This case presented two and only two issues to the Court of Appeals – neither of which is of general importance and both of which the court decided correctly and in accordance with decisions of this Court and of other courts of appeals. Those questions are: (1) could the District Court enforce a settlement agreement – the terms of which were read into the record and not in dispute and which both Petitioner (herself an attorney) and her counsel expressly agreed to on the record – over Petitioner's later unfounded unilateral refusal to perform; and (2) could Petitioner be sanctioned under 28 U.S.C. § 1927 – *not* Rule 11 of the Federal Rules of Civil Procedure – to pay to Respondents the amount of "excess costs, expenses and attorney's fees reasonably incurred because of" the necessity to enforce the agreement. Both courts below determined that the agreement should be enforced and that Petitioner should reimburse Respondents for the excess expenses ($6,565.69) caused by her multiplication of the proceedings.

Petitioner's presentation of her case at trial revealed the lack of basis for her claims. Near the close of her case a settlement conference was held in the Magistrate's chambers, wherein Respondents offered to give up their counterclaim for fraud and to withdraw their motion for Rule 11 sanctions (relating to Petitioner's trial and pretrial conduct) in exchange for Petitioner's dismissing her remaining claims and executing releases. After a recess of several hours during which Petitioner herself further negotiated the settlement terms, proceedings were held

in open court where the settlement terms and Petitioner's agreement to those terms were expressly stated on the record. Petitioner was further allowed (at her insistence) to "make a statement" on the record, whereupon she in no way suggested that her assent to the settlement was involuntary but instead prided herself because of the fact that "the goals that I wish to accomplish have largely been accomplished."

Thereafter, Petitioner reneged on the agreement and refused to follow through on the settlement by dismissing her claims and providing releases unless Respondents made a sizeable cash payment to her. Respondents at that point moved to enforce the settlement agreement and for sanctions under 28 U.S.C. § 1927 in the amount of the additional legal fees and expenses occasioned by the motion. The Magistrate granted both motions and the Court of Appeals unanimously affirmed.

Petitioner's claims that the settlement was extracted through duress or "threats" by the Magistrate are completely lacking in merit. As the Court of Appeals stated in its opinion:

> "A threat by a judge to impose sanctions unless a party settled at case might well be duress sufficient to void a settlement. Factually nothing of that sort happened in this case. The Magistrate *never* spoke personally with the Plaintiff about sanctions, nor did he ever tell her counsel that he would impose sanctions if she refused Defendants' offer. She concedes as much by not contending there was any personal conversation or indirect threat through her counsel. Instead she says: Even if the court did not intend to indicate that plaintiff would be sanctioned, the magistrate's comments and attitude created that impression. (Doc 116 p.8)

> Plaintiff's notion of a threat of sanctions from the Court is, by her own admission, a product of her inference from the circumstances or her imagination. She gives no indication which of the court's comments or manifestations of attitude created this "impression." Furthermore, this inference is all *post hoc*. When called upon in open court to comment on the settlement and indicate if she assented, Plaintiff, an attorney admitted to practice for nearly ten years, made absolutely no suggestion that the Court had threatened her.
>
> Our review of the record leads to the conclusion that Ullmann has failed to meet the heavy burden of demonstrating that her assent to the settlement agreement was procured by either fraud or duress."

(Petitioner's Appendix, pp. 66-67).

Petitioner's claims that she was given no chance to be heard prior to the imposition of sanctions also is untrue. As the Court of Appeals found:

> "Prior to awarding sanctions, the Magistrate conducted a hearing on October 15, 1987. Ullmann failed to appear for the hearing, but the Magistrate, upon determining that Ullmann had misunderstood the order, permitted her to participate in the hearing by telephone. After completing the hearing, the Magistrate published a twelve page opinion with findings of facts and conclusions of law none of which the plaintiff attacks other than to contend that sanctions were inappropriate."

(Petitioner's Appendix, p. 69)

In addition to misstating the facts, Petitioner also miscasts the reasoning of the District Court and the Court of Appeals in an apparent attempt to create the "issues" she presents or to find some basis – however untruthful – for suggesting that the rulings are erroneous or are in

conflict with other decisions. While she claims that the lynchpin of the Magistrate's opinion was a finding that Respondent's Rule 11 motion was a "counterclaim," or that its withdrawal furnished the only consideration for the settlement, in fact the Magistrate's finding was that "by itself, Defendants' release of their Counterclaim for fraud would have been sufficient consideration to support their settlement agreement" (Petitioner's Appendix, p. 15), and neither the Magistrate nor the Court of Appeals reasoned that the rule 11 motion ever was or could be a counterclaim.

Similarly, Petitioner's statement that both courts below somehow reasoned that there was no duress only because threats were made not directly to her but to her attorney has no basis and is expressly belied by a reading of the courts' opinions, which contain no such reasoning in dismissing Petitioner's contentions of duress.

In sum, Petitioner's attempt to ignore the record and the opinions below and to attempt to create error or conflicts out of whole cloth only points out the futility of her petition. This case in no way merits the Court's time or interest, and the Petition should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

Throughout her lengthy petition, Petitioner never once refers to any of this Court's stated reasons for granting certiorari as set forth in Supreme Court Rule 17.1, and with good reason – no such considerations exist.

POINT I

CONTRARY TO PETITIONER'S CONTENTION, THIS CASE PRESENTS NO ISSUE CONCERNING THE "PURPOSE" OR USE OF RULE 11, OR OF THE JURISDICTIONAL NATURE OF THAT RULE

Despite Petitioner's repeated recitation of Rule 11 and the "philosophy" underlying it, no issue as to Rule 11 is presented here. Petitioner was not sanctioned under Rule 11, but rather under 28 U.S.C. § 1927 for the express reasons set forth therein (for "so multiply[ing] the proceedings . . . unreasonably and vexatiously") and the amount of the sanction was computed by the express formula set forth therein (the ~~sum~~ of Respondents' "excess costs, expenses and attorneys fees reasonably incurred because of such conduct").

No question concerning Respondents' original motion under Rule 11 (which was withdrawn as part of the settlement agreement) is preserved for review or could be presented to this Court. Therefore, Petitioner's entire discussion of the purpose of Rule 11 and whether it was or could be used a "strategic tool", or whether its use constitutes "retaliation", is irrelevant. In view of the finding of the courts below that Respondent's withdrawal of their fraud counterclaim by itself was sufficient consideration for the settlement, Petitioner's argument concerning whether the withdrawal of a Rule 11 motion could be consideration also is irrelevant as that issue is not presented for review.

Petitioner's suggestion that the decision below somehow conflicts with *Port Drum Co. v. Umphrey*, 852 F.2d 148 (5th Cir. 1988), is without basis. The issue presented in that case was whether a non-party's motion under Rule

11 was by itself an independent basis for Federal question jurisdiction, and the court ruled that Rule 11 was not an independent grant of jurisdiction and upheld the lower court's dismissal on jurisdictional grounds. There is no similar question presented here and accordingly no conflict – either direct or indirect – is present.

POINT II

NO ISSUE CONCERNING THE VOLUNTARINESS OF PETITIONER'S AGREEMENT TO THE SETTLEMENT MERITS REVIEW

No issue concerning the voluntariness of Petitioner's agreement to the settlement merits review, and the holding below does not conflict with the decisions of this Court or of any court of appeals. Petitioner's continued protestation that the settlement was invalid within the framework of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), was adequately addressed and disposed of in the opinions below.

Petitioner, an experienced attorney, expressly assented to the terms of the settlement in open court and made no suggestion that her agreement was involuntary or exacted by any threat, and both courts below found that no threat was made. Petitioner's subsequent repudiation of the settlement agreement was, as the courts below found, the product either of a simple change of mind or of a deliberate attempt to "sandbag" the court and Respondents in order to extricate herself from the disastrous presentation of her case at trial. Neither of

these is a proper reason for finding that her earlier agreement to settle was anything other than valid and binding.*

The opinions of the courts below enforcing the agreement are in no way inconsistent with *Alexander* or with decisions of other courts of appeal on this issue. *See, e.g., Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207 (5th Cir. 1981); *Glass v. Rock Island Refining Corp.*, 788 F.2d 450 (7th Cir 1986); *Worthy v. McKesson Corp.*, 756 F.2d 1370 (8th Cir. 1985). The offhand suggestion by Petitioner that the decision below conflicts with *Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985) is baseless. In *Kothe* the district judge was found to have abused his discretion under Rule 16(f) of the Federal Rules of Civil Procedure by expressly threatening during pretrial proceedings to sanction a party if the party did not agree to settle for a certain amount in advance of trial and later doing just that after trial. Any thought of a conflict with *Kothe* is as imaginary as Petitioner's contentions concerning "threats" were found to be.

The decision below also undoubtedly is correct. As the District Court reasoned:

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*Petitioner's inference that this case is "similar in part" to *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 1106 (1988) is simply another incorrect and futile attempt to create some interest in this case and should be disregarded. First, the facts and issues of this case, which concerns the enforcement of a settlement agreement, do not present any issues for review concerning Petitioner's antecedent claims. *Bostick Foundry Co. v. Lindberg*, 797 F.2d 280, 283 (6th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 953 (1987). Second, in any event the underlying claims made by Petitioner bear no relation to the facts of *Hopkins*.

> "Plaintiff is an experienced attorney. She agreed on the record in open court without any protest of conditions to quite explicit terms of settlement. If she is permitted to repudiate this settlement on grounds it was involuntary, then it is hard to imagine any settlement agreement which would be enforceable."

(Petitioner's Appendix, pp. 23-24).

In sum, there are no reasons presented in the petition for why review is warranted with respect to these issues.

POINT III

NO QUESTION CONCERNING CONFLICT OF INTEREST OR RECUSAL MERITS REVIEW

Petitioner's "throwaway" arguments that this Court should consider whether her attorney had a conflict of interest or whether the Magistrate should have recused himself from determining whether to sanction her furnish no reason for granting the writ.

The contention that it was a conflict of interest for her attorney to be involved in the negotiation of the settlement was neither made nor preserved below, and therefore should not be considered here. In any event, the record is replete with proof (including Petitioner's own admissions) that she – an experienced attorney – was actively involved in the settlement decision, and she has posited no basis as to why this case presents any issue in this regard meriting review.

Petitioner's particular argument that the Magistrate should not have presided over the sanctions motion after deciding the motion to enforce the settlement agreement also was not presented or preserved below. Her blunderbuss application to have the Magistrate recused on other

grounds was duly considered and rejected. The suggestion that the decision below somehow is in conflict with *In re Yagman*, 796 F.2d 1165 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 108 S.Ct. 450 (1987), is without merit. In *Yagman* the decision to refer the question of sanctions to another judge on remand was based on a finding that the trial judge's belated award of sanctions served no purpose and was in an amount ($250,000) found to be so "massive" and "grossly disproportionate" to the attorney's conduct as to border on a fine for criminal contempt. No such findings were made, or could be made, in this case.

POINT IV

NO QUESTION CONCERNING THE AWARD OF SANCTIONS UNDER 28 U.S.C. § 1927 MERITS REVIEW

Petitioner's final alleged "question presented" is whether 28 U.S.C. § 1927 authorizes an award of attorney's fees against an attorney who "makes arguments of first impression, based both in fact and law, consideration of which lengthens or complicates the court proceedings?" That question certainly is not presented here. As aptly described by the court below, Petitioner's vexatious conduct was based not in fact and law, but only in her own imagination and desire to prolong the litigation, and the arguments she made are hardly of "first impression" or of general interest. This Court has routinely declined to review instances where settlement agreements were enforced against attorneys who entered into the agreements and later reneged on them, *See, e.g., Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.) (*en banc*), *cert. denied*, ___ U.S. ___, 107 S. Ct. 178 (1986); *Aro*

Corp. v. Allied Witan Co., 531 F.2d 1368 (6th Cir.), *cert. denied*, 429 U.S. 862 (1976), and there is no reason to do so here. Petitioner's conduct herein was so unprofessional and egregious that, thankfully, it does not present any issue of general interest which this Court need address.

CONCLUSION

For the reasons stated above, we ask that the petition for a writ of certiorari be denied.

Respectfully submitted,

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